STATE OF MICHIGAN
IN THE SUPREME COURT

MICHIGAN PUBLIC SERVICE COMMISSION,

Plaintiff-Appellant,

v

ENBRIDGE ENERGY, LIMITED PARTNERSHIP and
UPPER PENINSULA POWER COMPANY,

Defendants-Appellees.
_____/

Supreme Court No. 153118

Court of Appeals No. 321946

MPSC Case No. U-17077

MICHIGAN PUBLIC SERVICE COMMISSION'S CORRECTED APPLICATION FOR LEAVE TO APPEAL

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STATEMENT OF QUESTIONS PRESENTED

Michigan Courts honor agreements between parties resolving honest disputes about applicable law. E.g., *Dodge v Detroit Trust Co*, 300 Mich 575; 2 NW2d 509 (1942). The Michigan Public Service Commission approved a settlement agreement that resolved a dispute about whether electric revenue decoupling mechanisms were permitted by law. Although no statute or court decision prohibited these mechanisms at the time, the Court of Appeals found that electric decoupling mechanisms are prohibited by law and refused to honor the settlement agreement. The Court further held that "the strong public policy binding people to their settlements" does not apply when the settlements affect others that were not a party to the agreements.

1. Should this Court grant leave to appeal an opinion, which if allowed to stand, could lead to confusion in administrative proceedings about whether parties are bound by the agreements they sign?

   Appellant MPSC's answer: Yes.

   Appellant UPPCo's answer: Yes.

   Court of Appeals' answer: No.

   Appellee Enbridge's answer: No.

2. Should this Court grant leave to appeal when the Court of Appeals' holding could discourage settlement agreements in all cases resolving disputed issues of law?

   Appellant MPSC's answer: Yes.

   Appellant UPPCo's answer: Yes.

   Court of Appeals' answer: No.

   Appellee Enbridge's answer: No.

STATUTES AND RULES INVOLVED

MCL 24.278(2):

> Except as otherwise provided by law, disposition may be made of a contested case by stipulation, agreed settlement, consent order, waiver, default or other method agreed upon by the parties.

Mich Admin Code, R 792.10431(1):

> All parties to proceedings before the commission are encouraged to enter into settlements when possible and the provisions of these rules shall not be construed in any way to prohibit settlements.

MCR 2.507(G):

> **Agreements to be in Writing**. An agreement or consent between the parties or their attorneys respecting the proceedings in an action is not binding unless it was made in open court, or unless evidence of the agreement is in writing, subscribed by the party against whom the agreement is offered or by that party's attorney.

STATEMENT OF JURISDICTION, ORDER APPEALED, AND RELIEF SOUGHT

This Court has jurisdiction over all appeals from decisions of the Court of Appeals. Const 1963, art 6, § 4; MCR 7.303(B)(1). Appellant Michigan Public Service Commission appeals the Court of Appeals' December 22, 2015 decision, which upended a settlement agreement in a rate case. *Enbridge Energy, Ltd Partnership v Public Service Comm*, ___ Mich ___; ___ NW2d ___ (2015) (Docket No. 321946) (Attachment 1 to this Brief). The agreement between the Upper Peninsula Power Company (UPPCo) and several other parties allowed UPPCo to decouple revenue from sales to give it an incentive to promote energy efficiency. Enbridge Energy, Limited Partnership (Enbridge) was not a party to the agreement but later challenged it when the Court of Appeals overturned another utility's decoupling mechanism.

When UPPCo and other parties entered into the agreement creating an electric decoupling mechanism, they did not know whether Michigan law (Act 295 of 2008) allowed electric utilities to implement these mechanisms. Act 295 had just been enacted and no court had interpreted it. The Act mandated approval of gas decoupling mechanisms, but only required a report from the commission to the Legislature about electric decoupling. The Act did not expressly prohibit the commission from approving electric decoupling mechanisms, so several parties in various utility rate cases believed that the commission's general ratemaking authority permitted approval of these mechanisms. Proponents of electric decoupling mechanisms believed the Act mandated approval of gas decoupling

mechanisms, but left approval of electric decoupling mechanisms to the discretion of the commission.

Several electric utilities asked to implement decoupling mechanisms, and the commission granted their requests. Most of the mechanisms were approved as part of contested rate cases, but UPPCo's was approved through a settlement agreement. This became important later when the Court of Appeals rejected the commission's interpretation of the decoupling provisions of Act 295 and invalidated the commission's approval of another utility's decoupling mechanism. See *In re Detroit Edison Co*, 296 Mich App 101; 817 NW2d 630 (2012). Because *In re Detroit Edison Co* did not involve a settlement agreement, the question of how to handle mechanisms approved earlier through settlement agreements remained an open issue. This put the commission in a difficult spot. It could either uphold UPPCo's settlement agreement and risk being overturned for violating *In re Detroit Edison Co*, or it could strike down the agreement and risk being overturned for disregarding a freely negotiated agreement that had settled a disputed legal issue.

The commission sought to respect the Court of Appeals' instruction concerning electric decoupling mechanisms while also honoring settlement agreements that were approved before the Court spoke on the subject. After the Court decided *In re Detroit Edison Co*, the commission did not approve any new electric decoupling mechanisms, whether through contested cases or settlement agreements. The commission even dismissed one utility's request to reconcile a decoupling mechanism approved in a contested case. Yet, the commission honored

settlement agreements that predated *In re Detroit Edison Co* even though they created decoupling mechanisms. The commission followed this Court's precedent in *Dodge v Detroit Trust Co*, 300 Mich 575, 614; 2 NW2d 509 (1942), upholding agreements settling disputed issues of law.

The Court of Appeals was not satisfied. In a published decision, the Court ruled that this case was distinguishable from *Dodge* for two reasons. First, it held the parties should have known that electric decoupling mechanisms were illegal when they agreed to one and that "it was not reasonable to believe that the law was in dispute or otherwise unclear" at the time. *Enbridge Energy*, ___ Mich App at ___; slip op at 5. Second, and worse, the Court held, "[T]he strong public policy behind the long-standing doctrine that requires people to be bound by their settlements simply is not advanced when such a 'settlement' affects countless others that were not a party to the agreement." *Id*.

The Court of Appeals' opinion could impact future settlement agreements in commission cases. The opinion suggests that parties who settle cases are not bound by their agreements if they affect nonparties. This holding is contrary to precedent prohibiting courts from disregarding agreements absent a claim of mistake, fraud, or unconscionable advantage. *Plamondon v Plamondon*, 230 Mich App 54, 56; 583 NW2d 245 (1998). It is also contrary to the Administrative Procedures Act and Michigan Administrative Code, which allow and even encourage parties to settle cases in administrative proceedings. MCL 24.278; Mich Admin Code,

R 792.10431(1) ("All parties to proceedings before the commission are encouraged to enter into settlements when possible . . . .").

The Court's opinion could also discourage settlement agreements in all cases — not just cases in administrative proceedings — resolving disputed issues of law. The Court held that there could be no reasonable doubt about the law when the commission approved UPPCo's decoupling mechanism. This was an unprecedented holding since Act 295 did not expressly prohibit these mechanisms and many entities believed, prior to *In re Detroit Edison,* that they were permissible — including the commission, several administrative law judges, multiple utilities, and other parties. Moreover, for parties striving to reach an agreement in the midst of legal uncertainty (a common situation in the ever changing energy landscape), this published opinion presents a concrete barrier to settlement. If the parties resolve a dispute about the law in a settlement agreement, and a court later interprets the law differently, the parties run the risk that the same court will disregard the agreement as unreasonable.

Because the Court of Appeals' decision will likely confound efforts to settle cases that impact the public or resolve legal disputes, the commission asks this Court to grant its application for leave to appeal and reverse the Court of Appeals' decision. Alternatively, the commission asks this Court to strike the analysis regarding commission settlements and third parties, beginning with "Second, the settlement in *Dodge* involved private parties" on slip op, p 4, footnote 5, and the following paragraph. This analysis was not necessary for the case's disposition.

STATEMENT OF FACTS AND PROCEEDINGS

History of Proceedings

This appeal stems from UPPCo's 2009–2010 rate case (Case No. U-15988). The parties to that rate case entered into a settlement agreement establishing, among other things, a pilot revenue decoupling mechanism. *In re Upper Peninsula Power Co's Application for Rate Increase*, MPSC Case No. U-15988, Settlement Agreement (December 11, 2009), pp 5–6 (Attachment 2 to this Brief). A decoupling mechanism is designed to remove the link between non-fuel revenue and sales (i.e., "decouple" revenue and sales) to encourage utilities to promote energy efficiency and conservation. Without a decoupling mechanism, a utility has no incentive to promote energy efficiency or conservation because the less energy that customers use, the more revenue the utility loses. The parties to Case No. U-15988 agreed to allow UPPCo to implement a decoupling mechanism, and the commission approved their agreement. *In re Upper Peninsula Power Co's Application for Rate Increase*, order of the Public Service Commission, entered December 16, 2009 (Case No. U-15988).

All of UPPCo's ratepayers received notice of the case and were given an opportunity to intervene. The notice included a link to UPPCo's filing, which described the revenue decoupling mechanism it was requesting. (Case No. U-15988, 7/31/09 DeMerritt Aff, Notice, and Proof of Publication, pp 4–5.) UPPCo sent the notice to all cities, incorporated villages, townships, and counties in UPPCo's service territory; it also notified all intervenors in UPPCo's prior rate case. (*Id*. at 2.)

Further, notice was published in the Daily Press, The Daily Mining Gazette, The Daily News, and The Mining Journal. (*Id*. at 12–18.) The Michigan Technological University, Smurfit Stone Container Corporation, Calumet Electronics Corporation, and MPSC staff all intervened in the case. (Case No. U-15988 8/3/09 Hr'g Tr, p 5.) Enbridge, however, did not intervene in Case No. U-15988 or take part in the settlement.

Consistent with the settlement agreement, UPPCo filed an application in Case No. U-16568 to reconcile actual electric revenue with the base level established in Case No. U-15988. UPPCo notified all municipalities and counties in its service territory about this case as well, and notice was published in newspapers in its service territory. (Case No. U-16568, 6/17/11 Kyto Aff, Notice, and Proof of Publication, p 2.) While Case No. U-16568 was ongoing, the Court of Appeals issued its opinion in *In re Detroit Edison Co*, 296 Mich App at 110, overturning a commission order approving an electric decoupling mechanism for Detroit Edison in a contested case.

Enbridge was not a party to Case No. U-16568, but the other parties to that case addressed the significance of *In re Detroit Edison Co*. The commission also addressed the *Detroit Edison* decision in its order, acknowledging that the decision prevented it from approving decoupling mechanisms, but also noting that UPPCo's mechanism was approved in a settlement agreement, which is a binding contract, prior to the *Detroit Edison* decision. *In re Upper Peninsula Power Co's 2010 Reconciliation of its Revenue Decoupling Mechanism*, order of the Public Service

Commission, entered August 14, 2012 (Case No. U-16568), p 4 (Attachment 3 to this Brief). The commission, therefore, held that UPPCo could reconcile its mechanism in accordance with the language in the settlement. *Id.*

Then enters Enbridge. Although Enbridge never petitioned to intervene in Case No. U-16568, after the commission issued a final order in that case, Enbridge filed a joint Petition for Rehearing and Formal Complaint asking the commission to reconsider its order in light of *In re Detroit Edison Co.* The commission denied the petition, holding that Enbridge lacked standing, as a nonparty, to file a petition for rehearing. *In re Upper Peninsula Power Co's 2010 Reconciliation of its Revenue Decoupling Mechanism*, order of the Public Service Commission, entered September 25, 2012 (Case No. U-16568), p 3 (Attachment 4 to this Brief). Enbridge then re-filed its complaint in Case No. U-17077 (the case on appeal), seeking essentially the same relief. It argued that the Court of Appeals' opinion *In re Detroit Edison Co* rendered the decoupling mechanism unlawful. (Case No. U-17077, 10/23/12 Enbridge Compl, p 5, ¶ 18.)

In response to Enbridge's complaint, the MPSC staff filed a Motion for Summary Disposition and UPPCo filed a Motion to Dismiss. They argued that the complaint should be dismissed on procedural and substantive grounds. Procedurally, the MPSC staff and UPPCo argued that if Enbridge objected to UPPCo's decoupling mechanism and its reconciliation, Enbridge should have intervened in the cases approving and reconciling the mechanism. But Enbridge did not intervene in Case No. U-15988 (the case creating the mechanism) or Case

No. U-16568 (the case reconciling the mechanism). Substantively, Staff argued that *In re Detroit Edison Co* did not render UPPCo's decoupling mechanism unlawful because the ruling did not extend to decoupling mechanisms established through uncontested agreements. Staff argued that it would be inconsistent with Michigan precedent to use *In re Detroit Edison Co* as a basis to upset the parties' compromise. See *Dodge*, 300 Mich at 614.

The Proposal for Decision and Commission Order

In the Proposal for Decision, the Administrative Law Judge presiding over the case agreed with Staff and UPPCo that the case should be dismissed on procedural grounds. (Case No. U-17077, 2/18/14 PFD, p 12, Attachment 5 to this Brief.) The ALJ reasoned that Enbridge should have appealed the commission's decision in Case No. U-16568, if Enbridge was dissatisfied with it, rather than attempting to collaterally attack the order through a subsequent complaint. The ALJ said, "Enbridge, by failing to timely intervene and participate as a party in Case No. U-16568, as well as failing to timely appeal the orders in Case No. U-16568, has waived its right to object to the RDM [revenue decoupling mechanism]." (*Id*. at 9–10 (citation omitted).) The ALJ did not address Staff's substantive arguments.

The commission agreed that Enbridge's complaint should be dismissed, but the commission dismissed the case on substantive grounds. The commission recognized that when the parties to Case No. U-15988 were discussing settlement, it was unclear whether Act 295 of 2008 permitted electric decoupling mechanisms.

In re Complaint of Enbridge Energy, Ltd Partnership against Upper Peninsula Power Co, order of the Public Service Commission, entered May 13, 2014 (Case No. U-17077), p 11 (Attachment 6 to this Brief). But in order to settle the case, the parties agreed that Act 295 allowed UPPCo to implement an electric decoupling mechanism. *Id.* The commission held that the Court of Appeals' later decision in *In re Detroit Edison Co* did not "upset the parties' agreement." *Id.*, citing *Dodge*, 300 Mich at 614.

The commission also held that this case is distinguishable from *In re Detroit Edison Co* because the commission did not "approve or direct" the use of an electric decoupling mechanism. The commission merely "approved a settlement agreement between the parties, who agreed amongst one another that pursuant to Act 295, UPPCo could establish an electric RDM." *Id.* at 12. As a result, the commission held that *In re Detroit Edison* did not invalidate the settlement agreement between the parties. *Id.*

Enbridge appealed the commission's May order to the Court of Appeals.

The Court of Appeals' Opinion

In a published decision, the Court of Appeals reversed the commission's order, holding that the commission exceeded its statutory authority by upholding a settlement agreement with an electric revenue decoupling mechanism. *Enbridge Energy*, ___ Mich App at ___; slip op at 4–5. It further held that this Court's decision in *Dodge* did not save the commission from reversal.

The Court relied on *In re Detroit Edison* to hold that the commission exceeded its statutory authority by approving a settlement agreement that contained a decoupling mechanism. In the *Detroit Edison* opinion, authored by Judge Saad, the Court of Appeals noted that Act 295 required gas utilities to implement decoupling mechanisms but only required electric utilities to file a report about electric decoupling. *In re Detroit Edison*, 296 Mich App at 110. The Court, therefore, concluded that the commission lacked statutory authority to approve decoupling mechanisms for electric utilities. (*Id.*) In the Court's opinion in this case, also authored by Judge Saad, it faulted the commission for not following *In re Detroit Edison Co*. *Enbridge Energy*, ___ Mich App at ___; slip op at 4 ("In spite of the clear statutory language, the PSC approved the settlement agreement and relied on *Dodge*, 300 Mich 575 . . . for the proposition that it had the authority to approve a settlement agreement that resolved a disputed legal issue."). The Court of Appeals concluded that *Dodge* did not exempt settlement agreements that predated *In re Detroit Edison Co* from the prohibition against electric decoupling mechanisms.

The Court held that *Dodge* did not apply for two reasons. First, it held that there was no intervening change in the law and that the state of the law was never unclear. (*Id.* at 5.) The Court said that "reasonable minds could not have disputed the extent of the PSC's authority at the time it approved the settlement." (*Id.*) Second, it held that "the strong public policy behind the long-standing doctrine that requires people to be bound by their settlements simply is not advanced when such a 'settlement' affects countless others that were not a party to the agreement." (*Id.*)

ARGUMENT

I. The application for leave to appeal should be granted pursuant to MCR 7.305(B)(2), (3), and (5) because the Court of Appeals' opinion will lead to confusion in administrative proceedings about whether parties are bound by the settlement agreements they sign.

A. Issue Preservation

The commission preserved the issues in this Application for judicial review by addressing them in its order below and by raising them at the Court of Appeals when defending its order. The commission relied on this Court's holding in *Dodge*, 300 Mich 575 in its order, and it briefed the case below. In Case No. U-16568, a precursor to the case on appeal, the commission also addressed the binding nature of settlement agreements. *In re Upper Peninsula Power Co's 2010 Reconciliation of its Revenue Decoupling Mechanism*, 8/14/2012 Order, p 4.

B. Standard of Review

Generally, appellate courts review, de novo, a trial court's statutory interpretations and decisions to grant or deny motions to dismiss. *American Federation of State, Co v Detroit,* 468 Mich 388, 398; 662 NW2d 695 (2003). But this case involves more than just the commission's decision to grant a motion to dismiss. This case involves the commission's statutory interpretation of a statute that it administers, as well as two ratemaking orders that 1) granted UPPCo a $6.5 million rate increase and a revenue decoupling mechanism and 2) allowed UPPCo to collect $1.7 million in lost revenues for 2010 consistent with that mechanism. Because the

Court of Appeals' decision threatens to unravel the commission's ratemaking decisions, it should be judged by a different standard of review.

In all commission cases, Section 26(8) of the Railroad Act places a heavy burden of proof on appellants, like Enbridge, to show by clear and satisfactory evidence that the commission's order is unlawful or unreasonable. MCL 462.26(8); accord *Antrim Resources v Public Service Comm*, 179 Mich App 603, 620; 446 NW2d 515 (1989) ("The standard of judicial review of a decision of the PSC is whether that decision is lawful and supported by competent, material and substantial evidence on the whole record."). The Michigan Supreme Court has explained how difficult it is to show that an order is unlawful or unreasonable. In *In re MCI Telecom Complaint*, 460 Mich 396, 427; 596 NW2d 164 (1999) (quotation omitted), the Court said that to find a commission order unlawful "there must be a showing that the commission failed to follow some mandatory provision of the statute or was guilty of an abuse of discretion." Likewise, "The hurdle of unreasonableness is equally high. Within the confines of its jurisdiction, there is a broad range or 'zone' of reasonableness within which the PSC may operate." *Id.*

While an appellant always has the burden of proving that a commission order is unlawful or unreasonable, courts may apply different standards of review when evaluating the appellant's arguments depending on the nature of the decision involved. *In re Rovas Complaint*, 482 Mich 90, 108–09; 754 NW2d 259 (2008) ("[C]ourts should carefully separate the different agency functions under consideration and apply the proper standard of review for each."). For example, the

commission's legislative or quasi-legislative judgments may not be overturned unless the commission exceeded its statutory authority or abused its discretion. See *In re Rovas Complaint*, 482 Mich at 100–101; see also *Coffman v State Bd of Examiners in Optometry*, 331 Mich 582, 589–590; 50 NW2d 322 (1951).

Ratemaking is a legislative function, so Courts should defer to the commission's ratemaking decisions and apply the abuse of discretion standard. See *Detroit Edison Co v Public Service Comm*, 264 Mich App 462, 471; 691 NW2d 61 (2004); see also *Coffman*, 331 Mich at 589–590. An abuse of discretion does not occur unless "an unprejudiced person considering the facts upon which the decision was made would say that there was no justification or excuse for the decision." *Novi v Robert Adell Children's Funded Trust*, 473 Mich 242, 254; 701 NW2d 144 (2005).

The commission's statutory interpretations are subject to a different standard. Courts give respectful consideration to an administrative agency's interpretation of a statute that it administers. Although courts may not abdicate their judicial responsibility to interpret statutes by giving "unfettered deference" to an agency's statutory interpretation, an agency's statutory interpretation is nonetheless entitled to the "most respectful consideration" and should not be overturned without "cogent reasons." *In re Rovas Complaint*, 482 Mich at 93. As long as an agency's "interpretation does not conflict with the Legislature's intent as expressed in the language of the statute at issue, there are no such 'cogent reasons' to overrule it." *Younkin v Zimmer*, 497 Mich 7, 10; 857 NW2d 244 (2014) (citation and quotation marks omitted).

In *In re Rovas*, the Michigan Supreme Court reaffirmed the *Boyer-Campbell Co v Fry* standard of review for agencies' statutory interpretations. *In re Complaint of Rovas,* 482 Mich at 103. Under *Boyer-Campbell Co*, while agency interpretations are not controlling, they are an aid, and courts should give them weight when construing doubtful or obscure laws that the agency administers. *Boyer-Campbell Co v Fry,* 271 Mich 282, 296–297; 260 NW 165 (1935). The *Boyer-Campbell Co* Court even held that agency interpretations are "sometimes deferred to when not in conflict with the indicated spirit and purpose of the legislature." *Id.*

The standard of review in this appeal incorporates all the above because it stems from a ratemaking proceeding in which the commission interpreted statutes that it administers. The commission's ratemaking decisions should not be overturned unless the commission abused its discretion, and its statutory interpretations should be given the most respectful consideration. On all issues, Enbridge has the heavy burden of proving, by clear and satisfactory evidence, that the commission's order is unlawful or unreasonable.

C. Analysis

If the Court's opinion is allowed to stand, it will lead to confusion in administrative proceedings about whether parties are bound by the settlement agreements they sign. The Court held, "[T]he strong public policy behind the long-standing doctrine that requires people to be bound by their settlements simply is not advanced when such a 'settlement' affects countless others that were not a party to the agreement." *Enbridge Energy*, ___ Mich App at ___; slip op at 5 (citations

omitted). This holding was not necessary to support the Court's decision and is contrary to other decisions that have bound parties to their agreements in commission cases, even though they affect nonparties. The Court's holding also leaves people wondering whether agreements are binding if they affect nonparties.

The Court's holding 1) undermines the public's interest in fairly made settlement agreements, which is deeply rooted in the state's jurisprudence; 2) is clearly erroneous and violates Michigan precedent upholding commission decisions that affect nonparties; and 3) results in a material injustice to all the parties that negotiated the agreement at issue.

1. The Court's order harms the public interest by eroding public policy favoring settlement agreements, which is deeply rooted in the state's jurisprudence.

Under MCR 7.305(B)(2), an appellant has grounds to appeal an issue if it "has significant public interest and the case is one by or against the state or one of its agencies." Likewise, under MCR 7.305(B)(3), an appellant has grounds to appeal an issue if it "involves a legal principle of major significance to the state's jurisprudence." These requirements are met in this case because it involves a state agency and the opinion undermines strong public policy favoring settlement agreements by suggesting that parties are not bound by agreements affecting nonparties.

Michigan Courts have long favored settlement agreements and do not set them aside except in the most egregious circumstances. Settlement agreements, knowingly entered into, are binding and conclusive as to all matters included;

agreements cannot be disregarded absent a claim of mistake, fraud, or unconscionable advantage. *Plamondon v Plamondon*, 230 Mich App 54, 56; 583 NW2d 245 (1998); accord *Metropolitan Life Ins Co v Goolsby,* 165 Mich App 126, 128; 418 NW2d 700 (1987) ("Moreover, because settlement agreements are favored in Michigan, our Courts are generally reluctant to set them aside."). As this Court has held, "The law looks with favor on fairly made settlements, and they are conclusive on the rights of the parties to them." *Musial v Yatzik*, 329 Mich 379, 383; 45 NW2d 329 (1951). As long as a settlement agreement is submitted to a court in writing or stated on the record, the agreement is binding on the parties to the agreement. See MCR 2.507(G).

Settlement agreements are in the public's interest as well. *Transp Dep't v Christensen*, 229 Mich App 417, 429; 581 NW2d 807 (1998) ("[T]he policy of this state is to encourage the settlement of lawsuits because it benefits both the parties and the public."). Settlement agreements promote judicial efficiency. As this Court has said, "We recognize that in the practical realities of civil litigation, the vast majority of cases must be and are in fact settled. Wise judicial policy favors settlement between the parties." *Putney v Haskins*, 414 Mich 181, 189; 324 NW2d 729 (1982).

These pro-settlement principles apply equally to settlement agreements in administrative proceedings (including rate cases) and to orders approving those agreements. The Administrative Procedures Act specifically allows parties to settle administrative proceedings. MCL 24.278(2) ("Except as otherwise provided by law,

disposition may be made of a contested case by stipulation, agreed settlement, consent order, waiver, default or other method agreed upon by the parties."). And the Michigan Administrative Code even goes one step further by encouraging parties to settle administrative proceedings. Mich Admin Code, R 792.10431(1). Parties have been settling rate cases for years and years, and Michigan courts have universally upheld orders approving these agreements. E.g., *Ass'n of Businesses Advocating Tariff Equity v Public Service Comm*, 216 Mich App 8, 26; 548 NW2d 649 (1996) ("The MPSC utilized its administrative expertise to examine, modify, and approve the revised settlement proposal. . . . [T]his Court will not substitute its judgment for that of the MPSC.").

The Court's order in this case is jurisprudentially significant because it calls these long-standing, pro-settlement principles into question. In one breath the Court acknowledged that "settlements in the regulatory context carry the force of law and necessarily bind *all* consumers in the affected area, even those who were not a party to the settlement," *Enbridge Energy*, ___ Mich App at ___; slip op at 5, but in the next breath it deprived the settlement agreement in this case of the force of law: "[T]he strong public policy behind the long-standing doctrine that requires people to be bound by their settlements simply is not advanced when such a 'settlement' affects countless others that were not a party to the agreement." *Enbridge Energy*, ___ Mich App at ___; slip op at 5 (citations omitted).

These paradoxical statements are likely to cause confusion. When the Court referred to a settlement that "affects countless others," it was distinguishing

UPPCo's settlement agreement from the *Dodge* settlement agreement, which "involved private parties, who only themselves were bound by the agreement." *Id*. This may have been all that the Court of Appeals intended, but the Court used sweeping language that could be applied universally to discredit all agreements that affect others (not just the agreement in this case). This could cause confusion in many commission cases, most of which affect countless others that were not parties to the case (i.e., ratepayers). The Court of Appeals' statement about these agreements will likely cause people to wonder whether the agreements are binding at all.

In the regulatory context, saying that the strong public policy binding people to their agreements is not advanced when it affects others is like saying that the strong public policy behind stare decisis is not advanced when it affects future cases. The purpose of most settlement agreements in commission cases is to affect others by setting rates, just like the purpose of stare decisis is to affect future cases by establishing precedent. *Kimble v Marvel Entertainment, LLC*, 135 S Ct 2401, 2409; 192 L Ed 2d 463 (2015) ("*Stare decisis* — in English, the idea that today's Court should stand by yesterday's decisions — is 'a foundation stone of the rule of law.' ")

The Court of Appeals' opinion in this case would divorce settlement agreements in commission cases from their most basic purpose. Members of this Court have expressed concern with a similar interpretation of stare decisis. See *Petersen v Magna Corp*, 484 Mich 300, 314; 773 NW2d 564 (2009) ("*Robinson's*

statement that a wrongly decided case should 'invariably' be overruled was a chilling signal [to the stare decisis doctrine] that a conclusion that precedent has been wrongly decided is sufficient justification for overruling it.") (opinion by MARILYN KELLY, C.J.). Likewise, the Court of Appeals' opinion in this case sends a chilling signal to all parties wishing to settle commission cases that affect nonparties.

In sum, doubts about the binding nature of settlement agreements will discourage settlement. This harms the public's interest in fairly made settlement agreements and muddies the state's jurisprudence. Under MCR 7.305(B)(2) and (3), therefore, the Court of Appeals' misapplication of *Dodge* and undue limitation on settlements in commission cases is grounds for appeal.

2. The Court's ruling is clearly erroneous, violates binding precedent, and will cause material injustice.

Under MCR 7.305(B)(5)(a), an appellant has grounds to appeal a decision if it is clearly erroneous and will cause material injustice. An appellant likewise has grounds to appeal a decision that violates binding precedent. MCR 7.305(B)(5)(b). The Court of Appeals' decision to disregard a valid settlement agreement is clearly erroneous and violates binding precedent. The Court of Appeals did not identify a single Michigan case supporting its decision and did not distinguish contrary Michigan law. The opinion will also cause material injustice by rewarding Enbridge for not participating in settlement negotiations, while punishing parties who did participate.

a. The Court's ruling is clearly erroneous and violates binding precedent.

Concern that a settlement agreement could affect nonparties is irrelevant to whether the agreement is binding. Agreements settling commission cases often affect ratepayers that were not parties to the agreement, but this has never before been cause to disregard these agreements. The Court of Appeals did not point to a single Michigan case overturning an agreement for this reason. Indeed, there are no cases like this, but there are cases upholding commission decisions that affect nonparties and the public at large.

In *Attorney General v Public Service Comm No 2,* 237 Mich App 82; 601 NW2d 225 (1999), the Court of Appeals upheld a commission order approving a settlement agreement despite questions about whether the public's interest was adequately represented. Although Consumers Energy and the commission staff were the only two parties to the case, the Court held that "[p]articipation of fewer than all interested parties in the negotiation" did not mean that the public's interest was not represented. *Id*. at 94. Rather, it agreed with the commission that "the PSC staff adequately represented the public interest." *Id*. at 93–94; accord *Ass'n of Businesses Advocating Tariff Equity*, 216 Mich App at 25–26 (rejecting arguments that the commission failed to "represent the public interest through the actions of its staff.").

As was the case in *Public Service Comm No 2*, the commission staff adequately represented the public's interest in this case. Staff participated in all the cases that are at issue in this proceeding. Staff and several other parties

negotiated and signed the settlement agreement that first established UPPCo's revenue decoupling mechanism. *In re Upper Peninsula Power Co's Application for Rate Increase*, Case No. U-15988, 12/11/09 Settlement Agreement, pp 8–9. Staff also participated in the first case reconciling the mechanism (i.e., comparing actual electric revenue with the base level established in the rate case). In fact, staff contested several of UPPCo's proposals in that case. Finally, staff was a party to Enbridge's complaint case. Because staff represented the public's interest, there is no cause for concern that the settlement affected members of the public that were not a party to the agreement.

Besides staff's involvement protecting the public (i.e., UPPCo's customers), all UPPCo's customers had the option to intervene in their own right as well. In both the rate case and the reconciliation proceeding at issue here, UPPCo's customers had this option. UPPCo notified all municipalities and counties in its service territory about the case; it also notified all intervenors in its last rate case. (Case No. U-15988, 7/31/09 DeMerritt Aff, Notice, and Proof of Publication, p 2; Case No. U-16568, 6/17/11 Kyto Aff, Notice, and Proof of Publication, p 2.) Notice was published in the Daily Press, The Daily Mining Gazette, The Daily News, and The Mining Journal. (Case No. U-15988, 7/31/09 DeMerritt Aff, pp 12–18; Case No. U-16568, 6/17/11 Kyto Aff, p 12–22.)

Many parties took advantage of the opportunity to intervene in these cases. The Michigan Technological University, Smurfit Stone Container Corporation, Calumet Electronics Corporation, and the commission staff all intervened in the

rate case. (Case No. U-15988 8/3/09 Hr'g Tr, p 5.) And in the reconciliation proceeding, both Calumet Electronics Corporation and the commission staff intervened. (Case No. U-16568 6/30/11 Hr'g Tr, p 4.) Enbridge did not intervene in the rate case or the reconciliation proceeding, but it and all the utility's other customers had the opportunity to do so. There was no cause for concern that the settlement would affect people who did not participate in the case.

In sum, the Court of Appeals' opinion invalidating the agreement is clearly erroneous and violates binding precedent because the Court did not identify a single Michigan case supporting its conclusion and because there are Michigan cases upholding agreements like it. Further, the public interest was well represented.

b. The Court's ruling will cause material injustice.

If the Court of Appeals' opinion is allowed to stand, it would be a material injustice to all the parties who participated in this case below. Those parties dedicated time and money to negotiations that led to a revenue decoupling mechanism, while Enbridge sat on the sideline. At the time the settlement agreement was entered, no electric revenue decoupling mechanism had been found unlawful. The Court of Appeals nonetheless said that electric decoupling mechanisms were obviously unlawful. *Enbridge Energy*, ___ Mich App at ___; slip op at 5 ("[R]easonable minds could not have disputed the extent of the PSC's authority at the time it approved the settlement.").

Many people did not agree that electric decoupling mechanisms were unlawful, let alone obviously unlawful: this includes UPPCo and the parties to this

case; utilities in other cases that requested decoupling mechanisms; several presiding officers that acknowledged the commission's authority to approve these mechanisms; and the commission itself, which ultimately approved them. If electric revenue decoupling mechanisms were obviously unlawful when they were approved, Enbridge would have intervened and participated in rate-case negotiations to put a stop to the decoupling mechanism. Enbridge did not. Enbridge only got involved in the case once it was assured that decoupling mechanisms were unlawful.

Allowing Enbridge to undermine the outcome of a case that it chose to ignore would not be consistent with principles of equity and fair dealing. Cf *Amoco Oil Co v Kraft*, 89 Mich App 270, 275; 280 NW2d 505 (1979) (holding that it was not fair for a lessee to decline to exercise its fixed-price-purchase option and its option of first refusal and then seek to reassert its fixed-price option in the last year of the lease). It would invite interested parties to stay out of commission cases and collaterally attack settlement agreements and orders in those cases if it becomes expedient to do so. This is exactly what happened in this case. Enbridge did not intervene in Case No. U-15988, but later filed a complaint about an issue (the decoupling mechanism) that the commission addressed in that case.

Not only would it be unfair to invalidate the mechanism so long after it was approved, invalidating the mechanism could jeopardize the entire settlement agreement. The agreement included the following provision: "If the Commission does not accept this settlement agreement without modification, this settlement agreement shall be withdrawn and shall not constitute any part of the record in this

proceeding or be used for any other purpose whatsoever." (Settlement Agreement, ¶ 11.) The Court of Appeals has instructed the commission to modify this agreement by disregarding the decoupling mechanism included in it. If the commission is forced to modify the agreement, by the settlement's own terms, the agreement is void *ab initio*. This is not only a material injustice, it is an accounting and regulatory nightmare.[1]

In short, invalidating the agreement would be a material injustice to UPPCo and the other parties who negotiated the settlement agreement and relied on it. Because the Court's decision is clearly erroneous, violates binding precedent, and would cause material injustice, MCR 7.305(B)(5)(a) and (b) are satisfied.

c. Out-of-state cases support the commission's conclusion.

The Court of Appeals cited an out-of-state case to support its conclusion, but that opinion does not supersede Michigan law on settlements. The Court of Appeals relied on an Indiana case in which the Indiana Court of Appeals said that "a settlement agreement that must be filed with and approved by a regulatory agency

[1] UPPCo or another party could seek to completely nullify the entire settlement agreement and require a new rate case. At a minimum, the Commission will face the challenging task of unraveling the decoupling mechanism years after its operation. The mechanism was included in two UPPCo rate cases after the one at issue here, and there have been several reconciliation proceedings as well. Undoing the mechanism will require complex accounting. UPPCo under-collected in some years and over-collected in other years, and it collected different amounts from different customer groups each year. So a remand would not only affect Enbridge; it would affect UPPCo, every other party to the settlement, and UPPCo's ratepayers as well.

loses its status as a strictly private contract and takes on a public interest gloss." *Ind Bell Tel Co, Inc v Office of Utility Consumer Counselor (On Rehearing)*, 725 NE2d 432, 435 (Ind App, 2000) (citation and quotation marks omitted). The Court of Appeals compared the agreement to an Indiana Public Utility Commission order. This statement is accurate and consistent with Michigan law on the subject,[2] *but* it does not dictate the outcome in this case.

In *Ind Bell Tel Co, Inc*, the Indiana Court of Appeals considered, among other things, whether the Indiana Public Utility Commission had authority to enforce a settlement agreement and impose contract damages in the event of a breach. The court was concerned with enforcement and damages; it never said that the agreement was not binding in the first place. Rather, it implied that the agreement *was* binding *once it was approved* by its commission. *Id*. (holding that "a settlement agreement that must be filed with and approved by a regulatory agency" is "more closely akin" to a commission order.). Unlike the Indiana court, however, the Michigan Court of Appeals said that the settlement agreement in this case *was not* binding *even though it was approved* by the commission. This holding conflicts with prior holdings that have deferred to commission orders approving settlement agreements. *Ass'n of Businesses Advocating Tariff Equity*, 216 Mich App at 26.

[2] The Michigan Court of Appeals has reached a similar conclusion, holding that a settlement agreement does not establish traditional contract rights in a refund. Rather, "Because the MPSC has primary jurisdiction to regulate all public utilities and their rates and conditions of service, see MCL 460.6, the settlement agreement was without effect unless approved by the MPSC." *Attorney General v Public Service Comm*, 249 Mich App 424, 435; 642 NW2d 691 (2002).

Even in Indiana, where courts have held that settlement agreements in the regulatory context are not contracts, the agreements are still "agency actions" subject to review. *Indiana Dep't of Environmental Mgt v NJK Farms, Inc*, 921 NE2d 834, 845 (Ind App, 2010). And the Indiana Public Utility Commission continues to have "broad authority to supervise settlement agreements . . . and to be proactive in protecting the public interest." *Northern Ind Public Service Co v Ind Office of Utility Consumer Counselor*, 826 NE2d 112, 119 (Ind App, 2005). Indiana courts defer to the Indiana commission's decisions about settlement agreements under its "supervision and regulation." *Id*. The same is true in Michigan. See *Attorney General v Public Service Comm No 2,* 237 Mich App 82, 94; 601 NW2d 225 (1999). Yet, in this case, the Court of Appeals has refused to honor a commission order approving an agreement within its jurisdiction because it affected nonparties.

This Court should grant leave to appeal and clarify that settlement agreements approved by the commission are binding, even if they affect nonparties.

II. The application for leave to appeal should be granted pursuant to MCR 7.305(B)(2), (3), and (5) because the Court of Appeals' opinion will discourage settlement agreements in all cases resolving disputed issues of law.

A. Issue Preservation

See Argument I, Subsection A.

B. Standard of Review

See Argument I, Subsection B.

C. Analysis

If the Court of Appeals' interpretation of *Dodge* is allowed to stand, it will discourage settlement agreements in all cases (not just administrative proceedings) resolving disputed issues of law. The Court of Appeals held that electric revenue decoupling mechanisms were unlawful under Act 295 because the Act required gas utilities to implement decoupling mechanisms but only required a report about electric decoupling. The Court of Appeals did not stop there, however. Although Act 295 did not expressly prohibit these mechanisms, the Court of Appeals held that no reasonable person could have believed the mechanisms were lawful. As a result, the Court of Appeals refused to honor a settlement agreement that took the opposite view. The Court of Appeals did not discuss contrary views or cite cases to support this holding.[3]

If a court may freely disregard a settlement agreement because the parties did not resolve a legal issue of first impression like a court later did, parties will be loath to enter into agreements settling disputes about the law. This Court's decision in *Dodge* was intended to guard against this scenario.

The Court of Appeals' holding is jurisprudentially significant and of significant public interest because it discourages parties from settling disputes about the law. The Court of Appeals' ruling also violates longstanding precedent.

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[3] The Court cited *Timney v Lin*, 106 Cal App 4th 1121, 1127; 131 Cal Rptr 2d 387 (2003), which stands for a different proposition that is discussed later. (See Part II.C.2.c.)

1. The Court's order is jurisprudentially significant and of public interest because it discourages parties from settling disputes about the law.

The Court of Appeals' interpretation of *Dodge* is unprecedented. In *Dodge*, this Court said that "where a doubt as to what the law is has been settled by a compromise, a subsequent judicial decision . . . [to the contrary] affords no basis for a suit . . . to upset the compromise." 300 Mich at 613. The Court of Appeals held that *Dodge* does not apply in this case. *Enbridge Energy*, ___ Mich App at ___; slip op at 5. The Court of Appeals quoted extensively from *In re Detroit Edison* to explain why it was not reasonable to conclude that the commission had authority to approve a settlement agreement creating an electric decoupling mechanism. *Id.* at 4–5. The Court of Appeals then summarily concluded — without discussing contrary views — that the "unmistakably clear language" of Act 295 compelled it to hold that "it was not reasonable to believe that the law was in dispute or otherwise unclear." *Id.* at 5. The Court of Appeals did not cite any other cases dismissing a settlement agreement for this reason.[4]

If other courts and tribunals apply *Dodge* like the Court of Appeals applied it in this case, *Dodge* will no longer be relevant. In its opinion, the Court of Appeals implied that its analysis in *In re Detroit Edison* was so persuasive that it was not necessary to discuss contrary views. If this is the standard, *Dodge* is pointless. *Dodge* was written to protect parties settling a dispute about the law from later

[4] The Court cited *Timney*, 106 Cal App 4th at 1127, which stands for a different proposition that is discussed later. (See Part II.C.2.c.)

judicial decisions arriving at a different conclusion. But if the settlement is unreasonable merely because the parties' agreement is inconsistent with a court's later decision, *Dodge* does not really protect the parties to the agreement. No one will want to settle a dispute about the law if they know the agreement will not be binding on them if a court later disagrees.

In the ever changing energy regulatory landscape, agreements settling disputes about the law could become more common in commission cases. Right now, the Michigan Legislature is discussing changes to the state's energy laws. If the Legislature succeeds in amending existing laws or passing new laws, it could lead to a host of new cases implementing the law's requirements. New laws are also likely to raise legal questions that must be resolved before cases are decided or settled. Many of these issues would be resolved in contested cases. But while these issues are contested and appealed in some cases, parties may wish to settle other cases involving the same legal issues. If the Court of Appeals' opinion is allowed to stand in this case, parties will be reluctant to settle these legal issues at the risk that their agreements will be overturned by later court decisions.

This disincentive to settle disputes about the law harms a significant public interest. It discourages settlement agreements that allow parties to obtain mutually agreeable electric rates and to avoid the uncertainty and expense inherent in all litigation. This disincentive to settle also violates public policy favoring settlement agreements, which is deeply rooted in the state's jurisprudence. See *Putney*, 414 Mich at 189. So the Court's decision is jurisprudentially significant as

well. The criteria in MCR 7.305(B)(2) and (3) are satisfied, and the application for leave to appeal should be granted.

2. The Court of Appeals' ruling violates longstanding precedent.

The Court of Appeals was wrong to conclude that "it was not reasonable to believe that the law was in dispute or otherwise unclear." *Enbridge Energy*, ___ Mich App at ___; slip op at 5. There was a doubt about the law when the settlement agreement was approved — a doubt that no court had yet resolved. This is evidenced by the number of utilities that requested decoupling mechanisms and the number of people that supported their request. Proponents of electric decoupling mechanisms interpreted Act 295 as requiring the commission to take action that was previously discretionary (approve gas decoupling mechanisms), but not altering the commission's pre-existing discretionary authority to approve electric decoupling mechanisms. This interpretation of the Act may not have carried the day, but it was at least reasonable (as discussed further below). Since there were legitimate arguments on both sides of the issue, the parties were entitled to resolve this dispute as part of settlement negotiations, and no later judicial decision should have upset the compromise. *Dodge*, 300 Mich at 613. The Court of Appeals' holding violates this precedent.

a. *Dodge* was intended to protect, from subsequent judicial review, agreements settling honest disputes about the law.

As already discussed, Michigan courts uphold settlement agreements that are knowingly entered into; Michigan courts even honor agreements between parties resolving disputes about applicable law. *Dodge v Detroit Trust Co*, 300 Mich at 614; accord *Detroit Trust Co v Neubauer*, 325 Mich 319, 342–343; 38 NW2d 371 (1949). In *Dodge*, a party to a will contest, John Duval Dodge, sought to set aside a settlement agreement disposing of his claim to his father's considerable estate (his father, John F. Dodge, was the co-founder of Dodge Brothers, Inc.). At the time the parties entered into an agreement, there was "an honest dispute between competent legal minds as to what the law of perpetuities or restraint of alienation is." *Dodge*, 300 Mich at 614. And one of Mr. Dodge's many arguments was that the settlement violated public policy prohibiting restraint of alienation. *Id*. at 613. Although courts later clarified the law on these issues, this later clarification did not upset the earlier settlement agreement based on a different understanding of law. *Id*. at 598, 614–615.

In *Dodge*, the Supreme Court relied on "a host of decisions which recognize that, where a doubt as to what the law is has been settled by a compromise, a subsequent judicial decision by the highest court of the jurisdiction upholding the view adhered to by one of the parties affords no basis for a suit by him to upset the compromise." *Id*. at 614. It cited several Georgia cases, which it synthesized into one succinct rule: "Where the parties have conflicting claims, depending on a law point, and they compromise them, each is bound by the settlement, whether the law

point turns out to have been for or against them." *Id.* at 615. It also noted that the cases it cited from different jurisdictions "involve settlements or disputes as to a great variety of legal questions." *Id.*

Other jurisdictions continue to abide by this rule. See *Zawaideh v Neb Dep't of Health & Human Servs Regulation & Licensure*, 280 Neb 997, 1008–09; 792 NW2d 484 (2011) ("Generally speaking, where a doubt as to the law has been settled by a compromise, a subsequent judicial decision upholding a view favorable to one of the parties affords no basis for that party to upset the compromise.") (citing *Dodge*, 300 Mich at 614); see also *Republic Nat'l Life Ins Co v Rudine*, 137 Ariz 62, 66; 668 P2d 905 (Ariz App, 1983) ("The settlement of a controversy is valid and binding, not because it is the settlement of a valid claim, but because it is the settlement of a controversy, and when such settlement is characterized by good faith the court will not look into the question of law or fact in dispute between the parties, and determine which is right.") (citation omitted).

The rule governing disputes of law in settlements is similar to the rule governing mistakes of law in settlements. "A mere misapprehension of the law is no ground for disturbing the settlement of a doubtful claim." *Donald v United States*, 39 Ct Cl 357, 365 (1904) (citation omitted). This rule applies equally in Michigan. See *Bomarko, Inc v Rapistan Corp*, 207 Mich App 649, 652; 525 NW2d 518 (1994) ("A mistake of law is usually not a ground for equitable relief absent inequitable conduct."). If courts will affirm an agreement even if the parties to the agreement misunderstand an *established* legal principle, courts should certainly uphold an

agreement even though the parties misapply an *unsettled* legal principle, as in this case.

The Illinois Supreme Court has explained the basis for the mistake of law principle:

> It rests on the sound basis that there can be no certainty or security in affairs unless every person is supposed to know the law, and that to overhaul a settlement of doubtful and conflicting claims, voluntarily made, with full knowledge of the facts, on the sole ground of a misapprehension of the law, would open the door to endless litigation. [*Stover v Mitchell*, 45 Ill 213, 215–16 (1867).]

The same thing can be said about legal disputes resolved through settlement agreements. If parties to a settlement cannot agree to apply a law (one that has not been interpreted by any court) as they understand the law, it will discourage settlement and open the door to litigation that might otherwise have been avoided.

b. The Court of Appeals misapplied *Dodge*.

When the parties to Case No. U-15988 entered into a settlement agreement, there was a dispute about Act 295 and whether it permitted electric utilities to implement revenue decoupling mechanisms. In 2008, both the Consumers Energy Company and the Detroit Edison Company filed rate cases requesting authority to implement electric decoupling mechanisms. Indiana Michigan Power Company and UPPCo also requested the mechanisms. In Consumers' and Detroit Edison's rate cases, the Attorney General and the Association of Businesses Advocating Tariff Equity (ABATE) argued that the commission lacked statutory authority to approve

these mechanisms, but no one else took this position.[5] The Attorney General and ABATE did not intervene in UPPCo's case.

Despite the debate raging elsewhere, the parties to UPPCo's rate case (Case No. U-15988) entered into a settlement agreement allowing UPPCo to implement an electric decoupling mechanism. *In re Upper Peninsula Power Co's Application for Rate Increase*, Case No. U-15988, 12/11/09 Settlement Agreement, pp 5–6. By agreeing to the mechanism, the parties agreed that Act 295 allowed for electric decoupling mechanisms — if they had not agreed that the mechanisms were legal ratemaking mechanisms, they presumably would not have entered into an agreement creating one.

There was good reason to believe that electric revenue decoupling mechanisms were legal. The commission had been approving other ratemaking mechanisms that were similar to the revenue decoupling mechanisms proposed by utilities: these other mechanisms tracked specific utility expenses and ensured that utilities were not recovering more or less than their actual expenses. For example, the commission approved uncollectable expense tracking mechanisms, storm expense tracking mechanisms, and line-clearance expense tracking mechanisms, and the Court of Appeals upheld orders approving these mechanisms.[6]

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[5] Some administrative law judges and other parties opposed decoupling mechanisms for other reasons, but no one besides the Attorney General and ABATE took the position that the Commission lacked authority to approve the mechanisms.

[6] In *In re Mich Consol Gas Application*, 281 Mich App 545, 549–550; 761 NW2d 482 (2008), the Court of Appeals approved an uncollectible expense tracking mechanism. And in *Attorney General v Public Service Comm*, 262 Mich App 649,

There was also another reason to believe that electric decoupling mechanisms were legal. Act 295 did not expressly prohibit the commission from approving the mechanism. Although the Act required the commission to approve gas decoupling mechanisms, it did not expressly eliminate the discretion that the commission previously had, under its broad ratemaking authority, to approve ratemaking mechanisms like electric decoupling mechanisms. *ABATE v Public Service Comm*, 208 Mich App 248, 258; 527 NW2d 533 (1994) ("[T]he PSC is not bound by any particular method or formula in exercising its legislative function to determine just and reasonable rates.")

Ultimately, the Court of Appeals was not convinced by these arguments, *In re Detroit Edison Co*, 296 Mich App at 110, and held that the Legislature had intended to strip the commission of its authority to approve electric decoupling mechanisms. Although the commission accepted the Court of Appeals' decision without appeal, the commission still had to decide what to do about mechanisms that were approved earlier through settlement agreements. The commission decided to let these agreements run their course and not approve any new electric decoupling mechanisms once they expired. The commission relied on *Dodge*, which decreed that the Court of Appeals' order in *In re Detroit Edison* did not upset the agreement in Case No. U-15988 that created the electric decoupling mechanism.[7] *In re*

651–652; 686 NW2d 804 (2004), the Court of Appeals approved a storm expense tracker.

[7] Based on *Dodge*, the Commission decided that UPPCo was entitled to implement its mechanism and establish surcharges in Case No. U-16568 consistent with the agreement. Case No. U-16568 was a vehicle used to implement the decoupling

complaint of Enbridge Energy, Ltd, Case No. U-17077, 5/13/14 order, p 11 (citing *Dodge,* 300 Mich at 614.)

The Court of Appeals again disagreed and held that *Dodge* did not apply in this case because "reasonable minds could not have disputed the extent of the PSC's authority at the time it approved the settlement." *Enbridge Energy*, ___ Mich App at ___; slip op at 5. The Court of Appeals was wrong. The commission has just described the many reasons parties had to believe that the commission possessed this authority. These reasons may not have prevailed, but they were at least reasonable. So there was, without a doubt, an "honest dispute between competent legal minds" on the subject.[8] See *Dodge*, 300 Mich at 614. Consistent with *Dodge*, the Court of Appeals should have protected the agreement resolving this dispute from subsequent judicial review. *Id*. at 613–614.

The Court of Appeals also misconstrued *Dodge* when it said that *Dodge* required an intervening change in the law in order to apply. *Dodge* did not require an intervening change; it required a doubt about the law (i.e., an "honest dispute between competent legal minds") and a court decision resolving that doubt. *Dodge*,

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mechanism. It allowed UPPCo to reconcile actual revenue with the base revenue levels established in the rate case and credit or charge ratepayers for over- or under-recoveries.

[8] The Commission made these arguments in *In re Detroit Edison* but did not repeat them in this case because it believed that evidence of a disagreement would be sufficient to establish that there was "a doubt as to what the law is" at the time the settlement agreement was approved. *Dodge*, 300 Mich at 613. When it became apparent at oral argument that this was not enough, counsel for the Commission attempted to remind the court of arguments the Commission made in support of the Commission's interpretation of Act 295 in *In re Detroit Edison*.

300 Mich at 614. When these criteria exist, as they did here, a later judicial decision to the contrary is no basis to upset the compromise.[9]

c. The Court of Appeals should have followed its own persuasive precedent rather than a distinguishable out-of-state case.

This case is similar to *State Treasurer v Larson,* unpublished opinion per curiam of the Court of Appeals, issued August 28, 2001 (Docket No. 220652) (Attachment 7 to this Brief). While it is a non-binding, unpublished decision, *Larson* is persuasive as the Court of Appeals' most recent decision — prior to this case — applying the *Dodge* Court's reasoning. In *Larson*, the Department of Treasury sued a prisoner, Mr. Larson, seeking to garnish Mr. Larson's pension payments as reimbursement for the costs of incarceration. At the time, a dispute existed as to whether the state could garnish a prisoner's pension payments as reimbursement for incarceration expenses. *Id*. at 2. Rather than litigate the issue, Mr. Larson agreed to pay a portion of his pension to the state as reimbursement. Although a federal district court later held that the state could not garnish pension payments for incarceration expenses, the *Larson* Court nevertheless followed *Dodge* and upheld the parties' agreement:

> Here as in *Dodge*, the parties settled a matter that involved a disputed issue of law as a compromise to pursuing litigation to its legal conclusion. After review of the record and authorities in support, we conclude that, in light of the civil nature of the action and the judicial

[9] In any case, Act 295 was the intervening change in the law. The parties reached a settlement agreement in Case No. U-15988 shortly after a change in the law (2008 Public Act 295), which created confusion about the law governing decoupling mechanisms.

> disposition toward finality in litigation, *Dodge* is controlling. [*State Treasurer, supra* at 3.]

Like the legal issue in *Larson*, the commission's authority to approve a revenue decoupling mechanism for electric utilities was an unsettled legal issue when the settlement agreement was executed. And like the litigants in *Larson* who ended their litigation in return for a contractual agreement to pay less than the total amount at issue, the parties to the settlement agreement in Case No. U-15988 received the benefit of their bargain by avoiding litigation expenses, evading the uncertainty inherent in all litigation, and obtaining mutually agreeable electric rates.

Despite the similarities between UPPCo's agreement in Case No. U-15988 and Mr. Larson's agreement, the Court of Appeals reached a different conclusion here. It compared the agreement in this case to an agreement in a California case that blatantly contravened clear law. *Enbridge Energy*, ___ Mich App at ___; slip op at 5 ("[S]trong public policy favoring settlement does not legitimize a settlement agreement clause that is contrary to law."), citing *Timney*, 106 Cal App 4th at 1127. The defendant in *Timney* asked the California Court of Appeals to enforce an illegal deposit forfeiture provision because it was included in the settlement agreement. Not surprisingly, the court refused to do so. *Timney*, 106 Cal App 4th at 1127. In *Timney*, however, there was no doubt that the deposit forfeiture provision was illegal when it was included in the agreement.

Timney is not analogous to this case. No one in this case has suggested that settlement agreements are valid if they are contrary to the law. This is not the

issue; the issue, as described above, is whether a settlement agreement is valid if it settles an honest dispute about the law that has not been settled by any court.

The Court of Appeals should have upheld UPPCo's agreement like it did Mr. Larson's agreement instead of relying on a distinguishable out-of-state case. The Court of Appeals violated this Court's precedent in *Dodge* by not upholding the agreement. For this reason, MCR 7.305(B)(5)(b) is satisfied and the application for leave to appeal should be granted.

CONCLUSION AND RELIEF REQUESTED

The Michigan Public Service Commission respectfully asks this Court to grant leave to appeal two issues. First, the commission asks this Court to grant leave and reverse the Court of Appeals' holding that "[T]he strong public policy behind the long-standing doctrine that requires people to be bound by their settlements simply is not advanced when such a 'settlement' affects countless others that were not a party to the agreement." This statement will lead to confusion in administrative proceedings that affect nonparties because it will cause doubts about whether agreements in these proceedings are binding. The Court of Appeals' statement also deserves review because it violates Michigan precedent upholding commission agreements and orders that affect nonparties.

Second, the commission asks this Court to grant leave to appeal and reverse the Court of Appeals' interpretation of *Dodge*. This Court should reaffirm the commission's May 13, 2014 order in Case No. U-17077, which correctly applied *Dodge* to preserve the settlement agreement in Case No. U-15988. If the Court of Appeals' interpretation of *Dodge* prevails, it will discourage parties everywhere

from settling disputes about the law. By contrast, interpreting *Dodge* to protect agreements that resolve "honest dispute[s] between competent legal minds" will advance this state's public policy encouraging settlement. Alternatively, if this Court elects not to grant leave, it should strike the analysis from the Court of Appeals' published decision that settlement agreements are not binding if they affect the rights of non-parties. If this Court does not grant leave, that issue should be left for another day.

Respectfully submitted,

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Dated: February 5, 2016
MSC/153118/Appl for Lv to Appeal

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BILL SCHUETTE
ATTORNEY GENERAL

February 5, 2016

Clerk of the Court
Michigan Supreme Court
Michigan Hall of Justice
925 W. Ottawa St.
Lansing, MI 48915

Re: *Enbridge Energy, Ltd Partnership v Public Service Comm*
Supreme Court No. 153118
Court of Appeals No. 321946
Michigan Public Service Commission Case No. U-17077

Dear Clerk:

I am filing the Michigan Public Service Commission's Corrected Application for Leave to Appeal. The corrections replace outdated references to the Michigan Court Rules with updated references and fix a small number of grammatical and typographical errors. The changes do not alter the substance of the commission's arguments. The exhibits also remain the same.

Sincerely,

/s/ Spencer A. Sattler
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SAS:tlb
Enclosure
cc: Parties of Record
153118/Ltr